BEFORE THE
FEDERAL MARITIME COMMISSION

Docket No. 12-02

MAHER TERMINALS, LLC

COMPLAINANT

v.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

RESPONDENT

MAHER TERMINALS, LLC'S REPLY TO THE RESPONSE OF THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY TO MAHER'S MOTION TO STRIKE AFFIRMATIVE DEFENSES

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Maher Terminals, LLC ("Maher"), by the undersigned counsel, submits this reply to the response of Respondent Port Authority of New York and New Jersey ("PANYNJ" or the "Port Authority") to Maher's dispositive Motion to Strike Affirmative Defenses.

INTRODUCTION

Looking beyond the overwrought rhetoric of PANYNJ's response to the practical import of its substantive concessions confirms the correctness of Maher's motion to strike which should be granted to streamline this proceeding.

PANYNJ concedes—as it must—that:

(1) despite the erroneous "affirmative defense" label of its Amended Answer, the purported "affirmative defenses" Nos. 1, 2, and 5—failure to state a claim, justified actions, and standing—are really *not* affirmative defenses after all;

(2) the Commission's Rule 62 mandates its pleading "*must* contain . . . [a]ny affirmative defenses, *including allegations of any additional facts on which the affirmative defenses are based*." 46 C.F.R. § 502.62(b)(2)(iv) (emphasis added);

(3) yet PANYNJ failed to allege *any* facts with respect to what it labeled as "affirmative defenses" Nos. 1 and 4—failure to state a claim and collateral estoppel;

(4) regarding admitted affirmative defense No. 3—statute of limitations—it failed to allege *any* facts showing that Maher's claims accrued outside a statute of limitation; and

(5) regarding purported "affirmative defense" No. 2—justified actions—PANYNJ's pleading does not contain sufficient factual statements in support of an affirmative defense so as to render it plausible.

PANYNJ's concessions warrant striking the "affirmative defenses," whether purported or real.

PANYNJ also argues incongruously that it satisfied Rule 62's mandate to plead facts—while actually pleading *no facts* with respect to purported "affirmative defenses" Nos. 1 and 4. Such a strained reading of the plain language of the rule constitutes jiggery-pokery.

Desperately straining to avoid an order striking its "affirmative defenses," PANYNJ shifts ground in its Response and argues that only two of its purported five affirmative defenses are really affirmative defenses after all—the Nos. 3 and 4—statute of limitations and collateral estoppel. But, this provides no comfort to PANYNJ's other defenses—Nos. 1, 2, and 5—they must be dismissed as legally insufficient because *they are not affirmative defenses*.

PANYNJ also fails to acknowledge that affirmative defenses Nos. 3 and 4 should be dismissed because the Commission already decided them. Commission's Memorandum Opinion and Order of December 18, 2015 (the "Order") at 65–67 (rejecting PANYNJ arguments about statute of limitations and collateral estoppel).

And, PANYNJ fails utterly to grapple with the unambiguous plain language of the Order that applied the plausibility standard to pleadings filed with the Commission:

> The *Iqbal/Twombly* plausibility standard is consistent with sound administrative practice. The Commission's adjudicative proceedings "bear a remarkably strong resemblance to civil litigation in federal courts." *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 758 (2002). And the concerns that animated *Twombly* and *Iqbal* are relevant to Shipping Act proceedings.

Id. at 17. The Supreme Court in *Iqbal/Twombly*, and the Commission in its Order, expressly adopting the *Iqbal/Twombly* plausibility standard, applied it to *pleadings*, which include both complaints and answers—not just complaints.

PANYNJ erroneously asserts that most federal courts have not applied the *Iqbal/Twombly* plausibility standard to affirmative defenses. But, more importantly PANYNJ

misses the point. Even in federal courts—where the Commission's specific express requirement that *any facts must be pleaded* is not present—the majority of those federal courts now require *Iqbal/Twombly* plausibility for pleading affirmative defenses. And, furthermore the reason for requiring *Iqbal/Twombly* plausibility pleading of affirmative defenses applies with equal force to affirmative defenses to streamline proceedings.

Moreover, PANYNJ fails to satisfy the less demanding "notice" standard under Fed. R. Civ. P. 8 applicable to affirmative defenses, notwithstanding the new *Iqbal/Twombly* plausibility standard recognized by the majority of federal courts that have considered the question.

PANYNJ argues erroneously that Maher is not prejudiced. But, it is not necessary to establish prejudice to prevail on a motion to strike purported affirmative defenses that are not legally sufficient. Here, the prejudice to Maher is manifest because it is being required to re-litigate matters already decided by the Commission.

Finally, the affirmative defenses should be stricken with prejudice because PANYNJ has failed to seek leave to amend by showing the facts it can allege, the Commission already rejected the affirmative defenses, and PANYNJ has been on notice of these claims for years.

FACTUAL AND PROCEDURAL BACKGROUND

PANYNJ does not dispute Maher's explanation of the factual and procedural background set forth in its motion. Therefore, there are no material facts in dispute and the motion to strike may be decided as a matter of law.

As an initial matter, PANYNJ expressly concedes that purported affirmative defenses Nos. 1, 2, and 5 are really not affirmative defenses after all:

> 1) First Defense - "The claims for relief asserted by Complainant, in whole or in part, fail to state facts sufficient to constitute a claim for relief against the Port Authority. The facts supporting this affirmative defense will be developed during discovery;"

2) Second Defense - "The claims for relief asserted by Complainant are barred, in whole or in part, because the Port Authority's actions were justified since it acted in accordance with the Shipping Act. . . ."

3) Fifth Defense - "The claims for relief asserted by Complainant are barred, in whole or in part, based on Complainant's lack of standing. The facts supporting this affirmative defense will be developed during discovery."

Amended Answer at 10–12.

And, it is uncontested that the purported "affirmative defenses" as issue—(Nos. 1, 3, 4, and 5)—failed to allege *any additional* factual support not previously considered and rejected by the Commission:

1) First Defense - "The claims for relief asserted by Complainant, in whole or in part, fail to state facts sufficient to constitute a claim for relief against the Port Authority. The facts supporting this affirmative defense will be developed during discovery;"

2) Third Defense - "The claims for relief asserted by Complainant are barred, in whole or in part, by the applicable statute of limitations. Among other things, Counts I and VIII concerning consideration required for consent or changes of ownership or control are premised upon allegations regarding a policy outside the statute of limitations and upon certain changes of control that occurred outside the statute of limitations;"

3) Fourth Defense - "The claims for relief asserted by Complainant are barred, in whole or in part, by collateral estoppel. The facts supporting this affirmative defense will be developed during discovery;" and

4) Fifth Defense - "The claims for relief asserted by Complainant are barred, in whole or in part, based on Complainant's lack of standing. The facts supporting this affirmative defense will be developed during discovery."

Amended Answer at 10–12. Such affirmative defenses, without any "allegations of additional facts on which the affirmative defenses are based," patently fail to satisfy the plain language of Rule 62(b)(2)(iv).

ARGUMENT

I. PANYNJ Concedes That The First, Second, and Fifth Affirmative Defenses Are Not Really Affirmative Defenses—So They Should be Stricken

PANYNJ concedes that purported affirmative defenses Nos. 1, 2, and 5 are really not affirmative defenses after all: "The Port Authority's First, Second, and Fifth Defenses—failure to state a claim, justified conduct under the Shipping Act, and lack of standing, respectively—are not affirmative defenses at all. . . ." Reply at 2.

As pertinent here, "[i]f an allegation labeled as an 'affirmative defense' is not an affirmative defense, the improper 'affirmative defense' should be stricken as a matter of law[.]" *Dairy Employees Union Local No. 17 v. Dairy*, No. 5:14-CV-01295-RSWL-M, 2015 WL 505934, at *3 (C.D. Cal. Feb. 6, 2015) *reconsideration denied sub nom. Dairy Employees Union Local No. 17 Christian Labor Ass'n of the U.S. Pension Trust v. Ferreira Dairy*, No. 5:14-CV-01295-RSWL, 2015 WL 1952308 (C.D. Cal. Apr. 28, 2015) (striking 10 affirmative defenses with prejudice). Therefore, following PANYNJ concessions, purported "affirmative defenses" Nos. 1, 2, and 5 should be stricken.

PANYNJ argues erroneously that dismissal of these purported "affirmative defenses" is unwarranted because Maher is not prejudiced. Reply at 2. According to PANYNJ, "three of the defenses are not affirmative" and that "necessarily will remain in the case and be the subject of discovery, regardless of the outcome of Maher's motion." Reply at 12. Not so.

As an initial matter, "[i]f an allegation labeled as an 'affirmative defense' is not an affirmative defense, the improper 'affirmative defense' should be stricken *as a matter of law*[.]" *Dairy Employees Union*, 2015 WL 505934, at *3 (emphasis added). And importantly, "[a]lthough a motion to strike usually requires a showing that denial of the motion would prejudice the movant, it is appropriate for a court to strike defenses when they are clearly legally

insufficient, such as when there is no *bona fide* issue of fact or law." *Clark v. Milam*, 152 F.R.D. 66, 70 (S.D.W. Va. 1993) (striking multiple affirmative defenses); *see also Garcia-Barajas v. Nestle Purina Petcare Co.*, No. 109CV00025 OWWDLB, 2009 WL 2151850, at *2 n.2 (E.D. Cal. July 16, 2009) (finding that "Plaintiff's focus on 'prejudice' is misplaced . . . [a]lthough [a motion to strike] is not normally granted unless prejudice would result to the movant from the denial of the motion, it is appropriately granted where a prayer or defense is clearly legally insufficient.") (internal quotations omitted) (striking multiple affirmative defenses); *Fed. Deposit Ins. Corp. v. British-Am. Corp.*, 744 F. Supp. 116, 117–18 (E.D.N.C. 1990) (same). Thus, given that PANYNJ has *conceded* its first, second, and fifth purported affirmative defenses are *not really* affirmative defenses, no prejudice need be shown for the Presiding Officer to strike a legally insufficient defense such as this.

But even so, "[i]f the court were to permit legally unsustainable affirmative defenses to survive, [Plaintiff] would be required to conduct expensive and potentially unnecessary and irrelevant discovery." *Barnes v. AT & T Pension Ben. Plan-Nonbargained Program*, 718 F. Supp. 2d 1167, 1173-74 (N.D. Cal. 2010) (striking multiple affirmative defenses and denials to simplify and streamline the litigation). Maher should not be so prejudiced.

The prejudice to Maher of litigating meritless affirmative defenses is demonstrated by the Dkt. 08-03 proceeding. There, the Presiding Officer ruled on a discovery motion that Maher's financial evidence should be the subject of enormously burdensome discovery because:

> it relates to PANYNJ's statute of limitations defense and Maher's claim that other violations arose more recently. Even if the financial information itself is not admissible, the discovery sought could lead to the discovery of admissible evidence about Maher's knowledge of Lease EP-248 and how it compared to Lease EP-249 during the period from the signing of Lease EP-249 through the date Maher filed its Complaint and the other alleged violations that arose more recently within the statutory period.

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on Discovery Motions at 47 (A.L.J. July 23, 2010). What followed was a colossal waste of the resources of Maher, innocent third-parties, and the Commission over a span of several years on needless discovery and motion practice. Ultimately, the voluminous discovered financial evidence *had no bearing* on any statute of limitation defense. *Maher Terminals, LLC v. Fed. Mar. Comm'n,* 2016 WL 1104774 at *4 n.2 (D.C. Cir. 2016) (Court of Appeals explaining that the FMC held Maher's request for a cease and desist was not time barred and Maher was entitled to reparations for the full three year period before the filing of the complaint.) Additionally, the purported ground for the Commission's non-final ruling on statute of limitations was the port guarantee term of a marine terminal agreement, not any of the discovered financial evidence. Moreover, in its decision on the merits the Commission reversed itself and concluded the port guarantee was actually a *justification* for the discrimination—rather than a purported tip-off to Maher that it had a claim. *Maher Terminals, LLC v. Port Auth. Of N.Y. & N.J.*, 33 S.R.R. 821, 846 (F.M.C. 2014). And in yet another remarkable reversal, before the D. C. Circuit the Commission abandoned the port guarantee as a justification for its decision on the merits. *Maher Terminals,* 2016 WL 1104774 at *2 (explaining the "Commission's concession" that "neither the port guarantee nor . . . supposed superior terminal quality would justify the lower rent."). Plainly, that proceeding confirms how spurious affirmative defenses cause prejudice and why they should be stricken at the outset.

Failure to state a claim, the first purported "affirmative defense"—which PANYNJ now concedes is not really an affirmative defense—prejudices Maher because it was already decided by the Commission and Maher should not have to re-litigate defenses already decided. Order at 33-35 & 39-40; *U.S. ex rel. Spay v. CVS Caremark Corp.*, No. CIV.A. 09-4672, 2013 WL 1755214, at *3 (E.D. Pa. Apr. 24, 2013) (granting motion to strike affirmative defenses already

rejected in a motion to dismiss because "[o]therwise, defendants would have the opportunity to seek reconsideration of a court's legal finding through the vehicle of an affirmative defense."); *Trustees of Local 464A United Food & Commercial Workers Union Pension Fund v. Wachovia Bank, N.A.*, No. CIV.09-668 (WJM), 2009 WL 4138516, at *2 (D.N.J. Nov. 24, 2009) (same); *Prakash v. Pulsent Corp. Employee Long Term Disability Plan*, 2008 WL 3905445, at *2 (N.D. Cal. Aug. 20, 2008) (same).

Lack of standing, PANYNJ's fifth purported "affirmative defense"—which PANYNJ now concedes is not really an affirmative defense—likewise prejudices Maher because it was already advanced by PANYNJ and the Commission declined to grant PANYNJ's motion to dismiss for that reason. Order at 33–35 & 39 (sustaining Maher's remaining claims and explaining Maher alleged facts that it sustained injury from the unlawful consent fee practices and unlawful refusal to deal and categorical exclusion from the Global property). Maher sustains prejudice re-litigating defenses already decided.

Justified conduct under the Shipping Act, PANYNJ's second purported affirmative defense—which PANYNJ now concedes is not really an affirmative defense—likewise prejudices Maher because it was already advanced by PANYNJ and as a practical matter decided by the Commission which declined to grant PANYNJ's motion to dismiss on that ground. The Commission has already rejected the arguments of PANYNJ and the Presiding Officer that PANYNJ's conduct was justified by "the potential existence of legitimate business reasons." Order at 29, 33–35 & 39–40 ("the Commission may not assume that the Port Authority had legitimate business reasons" and then rejecting the Presiding Officer's argument that PANYNJ might have had legitimate business reasons in sustaining Maher's claims). As the Commission emphasized, PANYNJ offered no justification explaining the enormous discrepancy in consent

fees required by PANYNJ for some but not others or any potential legitimate business reason for the categorical exclusion of Maher from the property now subject to the Global lease. And, as explained in the motion to strike, PANYNJ's Amended Answer fails to grapple with the gravamen of the surviving claims. Maher should not have to re-litigate matters already decided. Order at 33-35 & 39–40. (sustaining Maher's remaining claims despite PANYNJ's arguments about potential legitimate business reasons).

PANYNJ cites only a single case for the proposition that "the proper remedy is not to strike the claim, but to simply treat it as a specific denial." Reply at 4, 6 (citing *Lugo v. Cocozella, LLC*, 2012 WL 5986775, *1 (S.D. Fla. Nov. 29, 2012)). However, *Lugo* did not involve the circumstances present here—specific denials improperly characterized as affirmative defenses rejected on a motion to dismiss. PANYNJ merely repeats the same allegations previously rejected by the Commission, Order at 33-35 & 39–40, and presents no new facts for its purported justifications—facts necessarily within PANYNJ's possession, if extant.

II. Affirmative Defenses Three and Four Should Also Be Stricken Because The Commission Previously Rejected Them

PANYNJ concedes that affirmative defenses three and four—statute of limitations and estoppel—are really affirmative defenses. Reply at 8–11. But, PANYNJ argues they were "adequately pleaded" because they provided Maher "adequate notice." *Id.* But as explained above, where the Commission has already decided the matter alleged in an affirmative defense, it should be stricken. Such is the case here where the Commission previously expressly rejected both arguments. Order at 61–67. Maher should not have to re-litigate these matters.

III. Affirmative Defenses Three and Four Should Also Be Stricken Because PANYNJ Failed To Allege Any Additional Facts on Which They are Based As Required By The Commission's Rule—46 C.F.R. § 502.62(b)(2)(iv)

PANYNJ concedes—as it must—that the Commission's rule speaks directly to the requirement here. Rule 62(b)(2)(iv) is clear on its face and is not subject to any differing interpretations: an answer "*must* contain . . . [a]ny affirmative defenses, including *allegations of additional facts* on which the affirmative defenses are based." *Id.* (emphasis added). And, PANYNJ concedes—as it must—that it alleged *no facts* with respect to admitted affirmative defense four—collateral estoppel. In its Reply, the PANYNJ expressly conceded that it alleged no "additional facts at this juncture." Reply at 11. Therefore, the affirmative defense should also be stricken for failure to allege *any* facts per the plain language of the Commission rule.

Regarding admitted affirmative defense No. 3, PANYNJ merely argues that it "is premised upon allegations regarding a policy outside the statute of limitations and upon certain changes of control that occurred outside the statute of limitations." Reply at 11. But this argument was already rejected by the Commission along with additional "officially noticeable facts" considered but which PANYNJ did not even allege in this affirmative defense. Order at 65–67. PANYNJ obstinately refused to allege *any* of the facts that the Commission required: (1) "any dates regarding Maher's change of control claims;" (2) facts showing "these claims accrued more than three years before March 30, 2012;" (3) facts that "identify these tenants" for which the PANYNJ consented to changes of control; and (4) "when the Port Authority consented to changes of control." Order at 67. PANYNJ concedes that the Commission's rule mandates pleading any facts on which the affirmative defenses is based, but cannot identify one fact that it actually alleged in its Amended Answer beyond what the Commission already considered and rejected. In these circumstances, the third affirmative defense should be stricken so that Maher does not have to re-litigate the same matters.

IV. PANYNJ Fails To Comply With Any Pertinent Pleading Standard

PANYNJ's lead argument is that the *Iqbal/Twombly* plausibility standard does not apply to affirmative defenses. Reply at 7–8. PANYNJ argues that Maher misleads the Presiding Officer by quoting decisions that repeatedly state that the majority of courts apply the *Iqbal/Twombly* plausibility standard to affirmative defenses. *Id.* at 5. Maher's citations to authority *quoting* those courts is obviously not misleading. This is what the courts actually wrote.[1] PANYNJ relies upon one decision, *Certain Underwriters at Lloyd's Subscribing to Policy no. TCN034699 v. Bell,* no. 5:13-cv-113-DCB-MTP, 2014 WL 4546046 at *2 (S.D. Miss. Sept. 11, 2014), to argue that *Iqbal/Twombly* plausibility is not the standard and quotes language that is *not* the court's language—but rather that of a law review article—without properly attributing the language as such. Reply at 5. Thus, PANYNJ's sleight of hand misleads.

More recent authority accords with Maher's citations to the majority of courts. *Hartford Underwriters Ins. Co. v. Kraus USA, Inc.*, No. 15-CV-05514-JSC, 2016 WL 127390, at *2 (N.D. Cal. Jan. 12, 2016) ("the majority of district courts have concluded that the pleading standards set forth in [*Iqbal* and *Twombly*] apply to affirmative defenses," citing cases "collecting cases").

PANYNJ also misleads the Presiding Officer by its quotation of colorful language decrying motions to strike "boilerplate affirmative defenses." *Raymond Weil, S.A. v. Theron*, 585 F.Supp. 2d 473, 489–90 (S.D.N.Y. 2008). PANYNJ fails to disclose that in that instance the court actually dismissed *eight* affirmative defenses. *Id.* at 490. The decision predates the *Iqbal*

[1] *See*, Motion at 10–12 citing and quoting, e.g., *Lucas v. Jerusalem Cafe, LLC*, No. 4:10-CV-00582-DGK, 2011 WL 1364075, at *1 (W.D. Mo. Apr. 11, 2011); *Francisco v. Verizon S., Inc.*, No. 3:09CV-737, 2010 WL 2990159, at *6, n.3 (E.D. Va. July 29, 2010); *Shield Tech. Corp. v. Paradigm Positioning, LLC*, No. 11 C 6183, 2012 WL 4120440 at *8 (N.D. Ill. Sept. 19, 2012); *Topline Sols., Inc. v. Sandler Sys., Inc.*, No. L-09-3102, 2010 WL 2998836, at *1 (D. Md. July 27, 2010); *Carretta v. May Trucking Co.*, No. CIV. 09-158-MJR, 2010 WL 1139099, at *2 (S.D. Ill. Mar. 19, 2010); *J & J Sports Prods., Inc. v. Ramirez Bernal*, No. 1:12-CV-01512-AWI, 2014 WL 2042120, at *2 (E.D. Cal. May 16, 2014).

decision of 2009 which extended *Twombly's* holding in an antitrust case to *all* civil pleadings. There simply was no *Iqbal/Twombly* plausibility issue before the *Raymond Weil* court in 2008.

PANYNJ argues that Maher "does not cite a single instance where the Commission has struck a defendant's affirmative defense under Rule 62(b)(2)(iv)." Reply at 2. But that is hardly surprising since the Commission only recently adopted the *Iqbal/Twombly* plausibility standard *forthrightly* on December 18, 2015. Order at 15–16 (Commission acknowledging that it previously failed to explain "its reasoning for adopting *Iqbal/Twombly* plausibility standard" and taking the opportunity to reaffirm the standard purportedly established *sub silentio* in 2011 in a decision wherein not even Commissioner Khouri understood that is what was happening); *Maher Terminals*, 2016 WL 1104774 at *3 (D.C. Cir. 2016) (if Commission is to "overrule or modify its previous decisions . . . *it must do so in a forthright manner*.")(emphasis added).

Substantively, PANYNJ ignores the plain language of the Order that applied the plausibility standard to pleadings filed with the Commission:

> The *Iqbal/Twombly* plausibility standard is consistent with sound administrative practice. The Commission's adjudicative proceedings "bear a remarkably strong resemblance to civil litigation in federal courts." *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 758 (2002). And the concerns that animated *Twombly* and *Iqbal* are relevant to Shipping Act proceedings.

Id. at 17. PANYNJ argues the plain language of the Order doesn't mean what is says because the Order dismissed claims in a complaint. But that argument has been repeatedly rejected by the majority of courts applying the *Iqbal/Twombly* plausibility standard to affirmative defenses.

Moreover, the reasons for requiring *Iqbal/Twombly* plausibility pleading of affirmative defenses apply with equal force to affirmative defenses to streamline proceedings. Both *Twombly* and *Iqbal* suggested that the costs of developing cases during discovery was a sufficient reason to require plausibility pleading. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544,

557–79 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 684–86 (2009). After all, the purpose of a motion to strike is to "avoid spending time and money litigating spurious issues." *Hartford Underwriters*, 2016 WL 127390, at *1.

PANYNJ argues erroneously that it satisfied the less demanding "notice" standard under Fed. R. Civ. Proc. 8. Reply at 9. Asserting that it hopes to learn facts in discovery is not enough. *Vazquez v. Triad Media Sols., Inc.*, No. 15 CV 07220WHWCLW, 2016 WL 155044, at *3 (D.N.J. Jan. 13, 2016) (the pleading must still give plaintiffs 'fair notice' of the defense. . . . [F]air notice requires more than a mere rote recitation of generally available affirmative defenses without citation to any other fact or premise from which an inference may arise that the stated defense is logically related to the case in any way.") (internal quotations omitted); *Dann v. Lincoln Nat. Corp.*, 274 F.R.D. 139, 145-46 (E.D. Pa. 2011) ("[E]ven before *Twombly* and *Iqbal*, affirmative defenses had to provide the plaintiff with fair notice of the nature of the defense. . . . In other words, when an affirmative defense omits a short and plain statement of facts entirely and fails totally to allege the necessary elements of the claim, it has not satisfied the pleading requirements of the Federal Rules.").

V. The Affirmative Defenses Should be Stricken With Prejudice

PANYNJ asserts that it "would be nonsensical" to preclude the it from amending its affirmative defenses. Reply. at 13. Yet, PANYNJ does not request leave to amend its affirmative defenses, establish that they satisfy fair notice or *Twombly/Iqbal* pleading standards, or even hint what additional facts could be plead to support its affirmative defenses. As the Commission ruled, "leave to amend may be denied when a party does not request leave to amend or does not indicate the particular grounds on which amendment is sought." Order at 67 (quoting *W. Overseas Trade & Dev. Corp. v. Asia N. Am. Eastbound Rate Agreement*, 26 S.R.R. 874, 883 n.11 (F.M.C. 1993)). When a party does not "hint[] . . . how they would amend their pleadings

to cure the defects," and does "nothing until they receive[] an adverse ruling," dismissal with prejudice results. *W. Overseas*, 26 S.R.R. at 882–83.

Here, although PANYNJ argues that courts "freely give leave to amend so long as no prejudice to the moving party results," Reply at 6 & 12–13, it never affirmatively requests such leave to amend its deficient affirmative defenses and instead only seeks denial of Maher's Motion. Reply at 13 ("For the foregoing reasons, Maher's Motion to Strike the Port Authority's Affirmative Defenses should be denied."). Such vague claims for relief are "the sort of 'bare request' that permits dismissal with prejudice." Order at 70 (citing *U.S. ex rel. Williams v. Martin-Baker Aircraft Co.*, 389 F.3d 1251, 1259 (D.C. Cir. 2004) and *Confederate Memorial Ass'n v. Hines*, 995 F.2d 295, 299 (D.C. Cir. 1993)).

Further, PANYNJ does not even hint what additional facts it could plead to cure its factually insufficient affirmative defenses. *See, e.g.*, Reply at 10–11 (arguing that for Third Defense that"[t]here is no mystery what statute of limitations applies," but failing to allege any additional facts, and that Fourth Defense "requires further factual development"). Neither do PANYNJ's most recent responses to revised interrogatories that request the basis for its affirmative defenses include any new facts sufficient to provide Maher with fair notice. *See* Ex. A, PANYNJ's Objections and Responses to Maher's Revised First Set of Interrogatories, Nos. 3–7 (Mar. 17, 2016) (alleging same facts asserted and rejected in PANYNJ's Reply to Maher's Exceptions to the Initial Decision); PANYNJ Reply to Maher's Exceptions to Initial Decision of January 30, 2015, at 20 (Mar. 17, 2015) (asserting that Maher's change of control occurred in 2007 and is time barred and APM change of control claim was already ruled on in Dkt. 07-01 proceeding). Thus, PANYNJ has failed to identify any facts that would justify leave to amend, despite that such facts have "presumably been in its possession for years." Order at 71. Where,

as here, a party "does not suggest how [amendments] could cure its failure" to allege sufficient facts, dismissal with prejudice is proper, not "drastic, disfavored action" as PANYNJ erroneously asserts. Order at 70.

Likewise, PANYNJ's tiresome cries that Maher burdens it with vexatious litigation, Reply at 2, 10 & 12, have now been debunked definitively by the Court of Appeals. What is particularly vexing about PANYNJ's prolonged war-of-attrition litigation strategy against Maher is the extraordinary length to which the Commission has repeatedly strained to eschew its own well-established authorities and the evidence. *Maher Terminals*, 2016 WL 1104774 at *2–4 (D.C. Cir. 2016) (remanding and holding that Commission's decision derived from a "*non sequitur,*" was "hopelessly convoluted," relied on "lame distinctions," was "quite unpersuasive," and when confronted with judicial scrutiny actually abandoned two of the three purported justifications for its decision). Thus, it is beyond cavil why PANYNJ's litigation against Maher has proven vexatious.

CONCLUSION

For the foregoing reasons, Maher respectfully requests that the Presiding Officer strike the Port Authority's purported "affirmative defenses" with prejudice.

Dated: March 24, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of March 2016, a copy of the foregoing was served by e-mail and Federal Express on the following:

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